U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

HERMAN LOGAN,

COMPLAINANT,

v.

UNITED PARCEL SERVICE,

RESPONDENT.

ARB CASE NO. 96-190

ALJ CASE NO. 96-STA-2

DATE: December 19, 1996

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1/]

FINAL DECISION AND ORDER OF DISMISSAL

The Administrative Law Judge (ALJ) submitted a Recommended Decision and Order (R. D. and O.) in this case arising under the employee protection provisions of the Surface Transportation Assistance Act of 1982, as amended in 1994 (STAA), 49 U.S.C.A. § 31105 (1996), recommending that the complaint be dismissed. R. D. and O. at 14.

The ALJ concluded that Complainant had engaged in protected activity under STAA, 49 U.S.C.A. § 31105(a)(1)(B) on September 29, 1994 when he asked to be relieved of further driving after an altercation earlier that morning with the Center Manager regarding providing Complainant with uniform pants. R. D. and O. at 13. *See id.* at 6-7, 9-10, 12. This STAA provision protects an employee's refusal to operate a vehicle because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health," (i), or because "the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition," (ii). In this regard, U.S. Department of Transportation regulation 49 C.F.R. § 392.3 (1993) states, in part: "No driver shall operate a motor vehicle, and a motor carrier shall not require or permit a driver to operate a motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause,

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[1/] On April 17, 1996, a Secretary's Order was signed delegating authority to issue final agency decisions under this statute and the implementing regulations (29 C.F.R. Part 1978) to the newly created Administrative Review Board. Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions.

as to make it unsafe for him to begin or continue to operate the motor vehicle." We agree with the ALJ that Complainant engaged in protected activity under 49 U.S.C.A. § 31105(a)(1)(B)(i).[2/]

Respondent's failure to initiate any adverse action against Complainant during or immediately after his altercation on September 29 prior to his refusal to continue driving later that morning and the close proximity in time between this protected activity and Complainant's discharge suggest that Complainant was terminated for dual or mixed motives: (1) his protected activity and (2) his misbehavior. *LaRosa v. Barcelo Plant Growers, Inc.*, Case No. 96-STA-10, ARB Rem. Ord., Aug. 6, 1996, slip op. at 5 and cases cited. However, we conclude that Respondent prevails under this dual motive analysis because it demonstrated by a preponderance of the evidence that it would have taken the same action against Complainant even if he had not engaged in the protected activity. *Olson v. Missoula Ready Mix*, Case No. 95-STA-21, Sec. Fin. Dec. and Ord., Mar. 15, 1996, slip op. at 5; *Clifton v. United Parcel Service*, Case No. 94-STA-0016, Sec. Dec. and Ord., May 9, 1995, slip op. at 14-15; R. D. and O. at 14.[3/]

[2/] Although the ALJ did not specifically cite this provision as the basis of Complainant's protected activity, he stated:

> It is clear that the Complainant did engage in protected activity when he asked to be relieved from driving on September 29, 1994. Mr. Logan was too upset to drive and the Respondent was aware of this Complaint. *The "when" clause under the Act* has been met as Logan was clearly too distressed to drive on September 29.

(Emphasis added). R. D. and O. at 13. The ALJ's reference is to the "when" clause in the original STAA, 49 U.S.C. App. § 2305(b) (1982). *See* R. D. and O. at 1. This statutory provision was recodified and modified stylistically on July 5, 1994 at 49 U.S.C.A. § 31105(a)(1)(B)(i), including deletion of the word "when." Because we find protected activity under subsection (i), we need not address the reasonableness of Complainant's refusal under subsection (ii). *But see Brown v. Wilson Trucking Corp.*, Case No. 94-STA-54, Sec. Dec. and Rem. Ord., Jan. 25, 1996, slip op. at 4-5; *Bryant v. Bob Evans Transportation,* Case No. 94-STA-24, Sec. Fin. Dec. and Ord., Apr. 10, 1995, slip op. at 7-8; and cases cited (violations of the "reasonable apprehension" clause in 49 U.S.C.A. § 31105(a)(1)(B)(ii) involve more than mechanical problems, and may include forcing an ill or fatigued operator to drive).

[3/] The ALJ found that:

> The record reflects that Logan was insubordinate with [Center Manager] Lofquest on the morning in question, used a tape recorder on company time, and acted inappropriately towards UPS officials when Lofquest arrived with a relief driver.
>
> In addition, as of October 4, 1994, [Division Manager] Koehler had noted that Logan had been disruptive and had made threats in the past, and could not explain his (continued...)

The ALJ's findings of fact are supported by substantial evidence on the record as a whole and therefore are conclusive. 29 C.F.R. § 1978.109(c)(3) (1995).[4/] *Frechin v. Yellow Freight System, Inc.*, Case No. 96-STA-9, ARB Fin. Dec. and Ord., Aug. 9, 1996, slip op. at 2; *Vogt v. Atlas Tours, Ltd.*, Case No. 94-STA-1, ARB Fin. Dec. and Ord., Jun. 24, 1996, slip op at 2. Accordingly, we adopt the ALJ's recommendation that this complaint be DISMISSED.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member

[3/](...continued)

actions on September 29.

> Thus, I find that Respondent presented legitimate reasons for firing Complainant that were not safety related, and that Respondent met its burden of establishing by a preponderance of the evidence that it would have fired Complainant absent his protected activities.

R. D. and O. at 14 (citation omitted). We note that even when employees have engaged in protected activities, employers may legitimately discipline them for insubordinate behavior and disruption. *Dunham v. Brock*, 794 F.2d 1037, 1041 (5th Cir. 1986); *Skelley v. Consolidated Freightways Corp., d/b/a CF Motorfreight*, Case No. 95-SWD-001, ARB Fin. Dec. and Ord. of Dism., July 25, 1996, slip op. at 5, n. 6; *Oliver v. Hydro-Vac Services, Inc.*, Case No. 91-SWD-00001, Sec. Dec. and Ord. of Rem. Nov. 1, 1995, slip op. at 17-18; *Carter v. Electrical District No. 2 of Pinal County*, Case No. 92-TSC-11, Sec. Dec. and Ord. of Rem., July 26, 1995, slip op. at 19-21; *Sprague v. American Nuclear Resources, Inc.*, Case No. 92-ERA-37, Sec. Dec. and Ord., Dec. 1, 1994, slip op. at 8-9.

[4/] The ALJ stated that Complainant had made a *prima facie* case of retaliatory discharge under STAA. R. D. and O. at 13. Since this case was fully tried on the merits, this point is largely irrelevant. Since Complainant has not prevailed by a preponderance of the evidence on the ultimate question of liability, *id.* at 14, it does not matter whether he presented a *prima facie* case. *Cook v. Kidimula International, Inc.*, Case No. 95-STA-44, Sec. Fin. Dec. and Ord. of Dism., Mar. 12, 1996, slip op. at 2 n.3 and cases cited.